

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

FALLBROOK HOSPITAL
CORPORATION,

Plaintiff,

vs.

CALIFORNIA NURSES
ASSOCIATION/NATIONAL
NURSES ORGANIZING
COMMITTEE (CNA/NNOC), AFL-
CIO

Defendant.

CASE NO. 13cv1233-GPC(WVG)

**ORDER GRANTING
DEFENDANT'S MOTION TO
DISMISS SECOND AMENDED
COMPLAINT**

[Dkt. No. 12.]

Before the Court is Defendant California Nurses Association/National Nurses Organizing Committee's ("CNA/NNOC" or "CNA") motion to dismiss the second amended complaint under Federal Rule of Civil Procedure ("Rule") 12(b)(6). (Dkt. No. 12.) Plaintiff Fallbrook Hospital Corporation d/b/a Fallbrook Hospital filed an opposition and Defendant filed a reply. (Dkt. Nos. 14 & 15.) The motion is submitted on the papers without oral argument pursuant to Civil Local Rule 7.1(d)(1). Based on the analysis below, the Court GRANTS Defendant's motion to dismiss.

Background

Plaintiff Fallbrook Hospital operates an acute care hospital in Fallbrook, California. (Dkt. No. 11, SAC ¶ 5.) Defendant CNA/NNOC is a labor organization

1 and was certified by the National Labor Relations Board (“NLRB”) on May 24, 2012
2 as the exclusive collective bargaining representative of registered nurses employed by
3 Fallbrook Hospital. (*Id.* ¶ 7.) Plaintiff brings this action under Section 301 of the
4 Labor Management Relations Act (“LMRA”), 29 U.S.C. § 185 *et seq.* against
5 Defendant for failing to comply with an oral bargaining agreement to submit all
6 unresolved disputes to final and binding arbitration. It alleges causes of action for
7 breach of contract and seeks relief in the forms of damages, specific performance and
8 declaratory relief.

9 According to the second amended complaint, in March 2012, the parties met to
10 discuss an agreement between Fallbrook Hospital and the CNA “which would define
11 certain terms and conditions to govern any organizing which might be conducted by
12 the CNA among Registered Nurses employed by Fallbrook, and which would define
13 a framework for the negotiation of an initial collective bargaining agreement in the
14 event the CNA was certified by the NLRB as the exclusive collective bargaining agent
15 for Fallbrook’s Registered Nurses.” (Dkt. No. 11, SAC ¶ 14.) At the meeting, the
16 parties entered into a proposed labor relations agreement (“proposed LRA”)¹ where the
17 parties agreed to submit any unresolved disputes about compliance with or construction
18 of the Agreement exclusively to final and binding arbitration.² (*Id.* ¶ 15.) They also
19 agreed that they would work together to resolve issues through direct discussion and
20 exclusive arbitration, instead of through appeal to outside persons, agencies,
21 organizations or authorities. (*Id.*) Written drafts of the proposed LRA were then

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23 ¹In its motion, Defendant seeks to incorporate the proposed LRA into the SAC
24 as it is extensively referred to in the SAC. Plaintiff opposes arguing that the proposed
25 LRA and the oral collective bargaining agreement are two distinct agreements and the
26 proposed LRA does not serve a basis for Plaintiff’s claim. The only reference in the
SAC to the proposed LRA is that the parties orally agreed to abide by four provision
in the proposed LRA. Based on Plaintiff’s opposition and the fact that the SAC does
not rely on the proposed LRA as a basis for its claims, the Court DENIES Defendant’s
request to incorporate the proposed LRA into the SAC.

27 ²According to Plaintiff, this allegation does not support its argument that
28 Defendant “clearly and unmistakably” waived its right because the oral CBA is distinct
from the proposed LRA.

1 exchanged between the parties. (Id. ¶ 17.)

2 On April 12, 2012, in a telephone conversation between Don Carmody,
3 Fallbrook's representative, who is also an attorney, and Jane Lawhon, legal counsel for
4 the CNA, the parties expected the proposed LRA to be executed once the parties
5 completed exchanging comments regarding minor modifications. (Id. ¶ 24.) In that
6 conversation, Carmody suggested, and Lawhon agreed, that the parties should simply
7 orally agree to apply the terms memorialized in the most recent written draft copy of
8 the proposed LRA with respect to the following terms: "a) the CNA's service of a
9 'Notice of Intent to Organize' the Registered Nurses employed by Fallbrook; b) the
10 CNA's subsequent organizing activity at Fallbrook; c) the filing of a petition for an
11 election with, and the conduct of a secret ballot election by, the National Labor
12 Relations Board (NLRB), and d) the negotiation of an initial collective bargaining
13 agreement in the event the CNA won an election and was certified by the NLRB,
14 including the standard of the conduct of bargaining between the Parties as specified on
15 page 5, Section 4(a)(2) of the Proposed LRA." (Id. ¶ 25.)

16 The SAC alleges that the CNA agreed to a standard that would apply to the
17 parties' negotiations of a collective bargaining agreement ("CBA") and that the
18 negotiations would be governed by a private standard developed by the parties, and not
19 by any outside law and a private arbitrator would hold the exclusive jurisdiction to
20 decide whether the CNA or Fallbrook had violated the agreed upon standard. (Id. ¶
21 26.) Pursuant to the terms and conditions of the oral CBA, the parties waived their
22 right to resolve any dispute by filing an unfair labor practice charge with the NLRB and
23 all disputes would be submitted directly to the arbitrator. (Id. ¶ 27.)

24 To demonstrate that the parties were in compliance with the terms and conditions
25 of the oral CBA, Plaintiff points to numerous instances where the parties conducted and
26 complied with the terms and conditions of the oral CBA. (Id. ¶ 32.) Moreover, from
27 April 12, 2012 until September 26, 2012, Plaintiff claims that the CNA sought to
28 resolve all disputes through the oral CBA's dispute resolution procedure and presents

1 two examples where the CNA presented disputes to an arbitrator. (Id. ¶¶ 33, 34.)

2 In addition, the SAC alleges that on July 3, 2012, the parties participated in a
3 bargaining session pursuant to the oral CBA when a dispute arose. (Id. ¶¶ 36, 38.) Mr.
4 Carmody stated that when he told Matthews, the CNA representative, that he could take
5 the matter to binding arbitration in compliance with the terms of the oral CBA,
6 Matthews did not state any disagreement that arbitration was the parties' agreed upon
7 forum. (Id. ¶ 42.) Matthews ultimately filed an unfair labor practice charge against
8 Falbrook with the NLRB in July 2012. (Id. ¶¶ 43, 44.) Plaintiff complains that
9 Defendant breached the oral CBA agreement by filing a ULP charge with the NLRB.

10 **A. Legal Standard on Federal Rule of Civil Procedure 12(b)(6)**

11 Federal Rule of Civil Procedure ("Rule") 12(b)(6) permits dismissal for "failure
12 to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). Dismissal
13 under Rule 12(b)(6) is appropriate where the complaint lacks a cognizable legal theory
14 or sufficient facts to support a cognizable legal theory. See Balistreri v. Pacifica Police
15 Dep't., 901 F.2d 696, 699 (9th Cir. 1990). Under Federal Rule of Civil Procedure
16 8(a)(2), the plaintiff is required only to set forth a "short and plain statement of the
17 claim showing that the pleader is entitled to relief," and "give the defendant fair notice
18 of what the . . . claim is and the grounds upon which it rests." Bell Atlantic Corp. v.
19 Twombly, 550 U.S. 544, 555 (2007).

20 A complaint may survive a motion to dismiss only if, taking all well-pleaded
21 factual allegations as true, it contains enough facts to "state a claim to relief that is
22 plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Twombly,
23 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual
24 content that allows the court to draw the reasonable inference that the defendant is
25 liable for the misconduct alleged." Id. "Threadbare recitals of the elements of a cause
26 of action, supported by mere conclusory statements, do not suffice." Id. "In sum, for
27 a complaint to survive a motion to dismiss, the non-conclusory factual content, and
28 reasonable inferences from that content, must be plausibly suggestive of a claim

entitling the plaintiff to relief.” Moss v. U.S. Secret Serv., 572 F.3d 962, 969 (9th Cir. 2009) (quotations omitted). In reviewing a Rule 12(b)(6) motion, the Court accepts as true all facts alleged in the complaint, and draws all reasonable inferences in favor of the plaintiff. al-Kidd v. Ashcroft, 580 F.3d 949, 956 (9th Cir. 2009).

Where a motion to dismiss is granted, “leave to amend should be granted ‘unless the court determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency.’” DeSoto v. Yellow Freight Sys., Inc., 957 F.2d 655, 658 (9th Cir. 1992) (quoting Schreiber Distrib. Co. v. Serv-Well Furniture Co., 806 F.2d 1393, 1401 (9th Cir. 1986)). In other words, where leave to amend would be futile, the Court may deny leave to amend. See Desoto, 957 F.2d at 658; Schreiber, 806 F.2d at 1401.

B. Allegations as to Waiver of Statutory Right

Defendant moves to dismiss arguing that the SAC does not allege a “clear and unmistakable” waiver of the right to file unfair labor practice charges with the NLRB. Plaintiff argues that Defendant has incorrectly interpreted “clear and unmistakable” standard.

There is a statutory right to bring unfair labor practice charges before the NLRB. Hospital of Barstow, Inc. v. CNA/NNOC, No. ED CV 13-1063(CAS)(DTBx), 2013 WL 4590973, at *4 (C.D. Cal. Aug. 26, 2013) (citing Nash v. Fla. Indus. Comm’n, 389 U.S. 235, 238 (1967) (noting that it is unlawful for an employer to “seek to restrain an employee in the exercise of his right to file charges”); see Isla Verde Hotel Corp., v. N.L.R.B., 702 F.2d 268, 272 (1st Cir. 1983). In Wright, the United States Supreme Court held that a collective bargaining agreement waives the right of a union member to pursue employment-related statutory claims in court only when the waiver of those rights is “clear and unmistakable.” Wright v. Universal Maritime Serv. Corp., 525 U.S. 70, 75, 80 (1998) (holding that arbitration clause which provided for arbitration of “[m]atters under dispute,” was not sufficiently clear to waive a union member’s right to file a claim under the ADA in a federal district court.) A waiver of a statutory right

1 must be “clear and unmistakable.” Id. at 80. The Court also stated that any collective
2 bargaining agreement requirement to arbitrate must be particularly clear. Id. at 79.

3 “[A] knowing waiver does not occur where neither the arbitration clause nor any
4 other written employment agreement expressly put the plaintiffs ‘on notice that they
5 were bound to arbitrate [employment discrimination] claims.’” Renteria v. Prudential
6 Ins. Co. of Am., 113 F.3d 1104, 1108 (9th Cir. 1997) (quoting Prudential Ins. Co. of
7 Am. v. Lai, 42 F.3d 1299, 1305 (9th Cir. 1994)). “[A] collective-bargaining agreement
8 that clearly and unmistakably requires union members to arbitrate ADEA claims is
9 enforceable as a matter of federal law.” 14 Penn Plaza LLC v. Pyett, 556 U.S. 247
10 (2009) (CBA required union members to submit all claims of employment
11 discrimination to binding arbitration under the grievance and dispute resolution
12 procedure.”) The determination of whether statutory rights are subject to grievance
13 procedures contained in a collective bargaining agreement is a question of law for the
14 Court. See Collins v. Lobdell, 188 F.3d 1124, 1127 (9th Cir. 1999).

15 First, Plaintiff contends that the clear and unmistakable standard has not been
16 used to examine whether or not a party has agreed to waive its right to file unfair labor
17 practices (“ULP”) charges before the NLRB but instead used to determine if parties
18 agreed to waive their rights to bargain over a mandatory subject of bargaining.
19 Defendant asserts that the ULP filed with the NLRB alleged that Fallbrook violated
20 specific statutory provision, namely sections 8(a)(1) and (5), of the NLRA, which are
21 mandatory subjects of bargaining. The Court agrees with Defendant. Plaintiff filed an
22 ULP before the NLRB based on sections 8(a)(1) and (5).³ Therefore, the clear and
23 unmistakable standard applies.

24 Second, Plaintiff contends that even if the Court applies the clear and

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26 ³Section 8(a)(1) provides that it “shall be an unfair labor practice for an employer
27 (1) to interfere with, restrain, or coerce employees in the exercise of the rights
28 guaranteed in section 157 of this title.” 29 U.S.C. § 158(a)(1). Section 8(a)(5) states
that it “shall be an unfair labor practice for an employer (5) to refuse to bargain
collectively with the representatives of his employees, subject to the provisions of
section 159(a) of this title.” 29 U.S.C. § 158(a)(5).

1 unmistakable waiver standard, the SAC satisfies the Rule 12(b)(6) standard. It asserts
2 that a waiver of statutory rights may be evidenced by the parties' conduct and
3 bargaining history and cites to Local Joint Executive Bd. of Las Vegas v. NLRB, 540
4 F.3d 1072, 1079 (9th Cir. 2008); and NLRB v. United Techs. Corp., 884 F.2d 1569,
5 1575 (2d Cir. 1989). Defendant opposes.

6 In the SAC, Plaintiff asserts that CNA's past conduct clearly and unmistakably
7 demonstrates that it knowingly waived its right to file charges with the NLRB. (Dkt.
8 No. 11, SAC ¶¶ 32(g), 33, 34, 35, 42.) These allegations assert that CNA arbitrated or
9 intended to arbitrate certain disputes with an arbitrator. Based on CNA's past conduct,
10 this confirmed the parties' agreement to submit all disputes, including those that would
11 otherwise be the basis of a ULP charge, to binding arbitration.

12 In Local Joint Executive Bd. of Las Vegas, the Ninth Circuit noted that the
13 standard for waiving statutory rights is high. Local Joint Executive Bd. of Las Vegas,
14 540 F.3d at 1079. It is the employer's burden to show that the contractual waiver is
15 "explicitly stated, clear and unmistakable." Id. (citations omitted). The waiver may
16 be demonstrated by bargaining history but requires "the matter at issue to have been
17 fully discussed and consciously explored during negotiations and the union to have
18 consciously yielded or clearly and unmistakably waived its interest in the matter." Id.

19 In addition, in United Techs. Corp., the Second Circuit stated that because
20 federal labor policy disfavors waivers of statutory rights by union, the waiver must be
21 clear and unmistakable. United Techs. Corp., 884 F.2d 1569, 1575 (2d Cir. 1989).
22 "Such waiver may be found in an express provision in the parties' collective bargaining
23 agreement, or by the conduct of the parties, including their past practices and
24 bargaining history, or by a combination of the two." Id. (citations omitted).
25 "Bargaining history and past practices-if taken alone-may establish waiver of a
26 mandatory bargaining subject when the matter was thoroughly aired in past
27 negotiations and the union 'consciously yielded' its rights in the matter." Id. (citations
28 omitted).

1 In line with Wright, whether through a written CBA or past conduct by the
2 parties, Plaintiff must demonstrate that the CNA consciously yielded its statutory rights
3 in the matter. See Local Joint Executive Bd. of Las Vegas, 540 F.3d at 1079.

4 Here, the fact that the parties previously participated in telephonic arbitration
5 proceedings or intended to pursue arbitration in order to resolve a dispute does not
6 sufficiently allege that Defendant clearly and unmistakably waived its right to assert
7 ULP claims with the NLRB. (See Dkt. No. 11, SAC ¶¶ 32(g), 33, 34.) Moreover, a
8 general, conclusory allegation that the CNA sought to resolve disputes “only through
9 the Parties’ exclusive Dispute Resolution Procedure” is not sufficient to demonstrate
10 a waiver. (See Dkt. No. 11, SAC ¶ 35.) Lastly, Plaintiff also alleges that at one
11 meeting, when Mr. Carmody stated that the parties had a dispute and that if Stephen
12 Matthews, the Chief Spokesperson for the CNA, was not happy, he could take the
13 matter to binding arbitration, in compliance with the terms of the oral CBA, Matthews
14 did not state any disagreement. (Id. ¶¶ 36, 42.) The fact that Matthews did not object
15 does not demonstrate a “clear and unmistakable” waiver. The allegations in the SAC
16 are either ambiguous or not sufficient to allege that Defendant “clearly and unmistakably”
17 waives its statutory right to file a claim with the NLRB. They do not allege that the
18 matter was thoroughly aired in past negotiations and the union consciously yielded its
19 rights in the matter. See Local Joint Executive Bd. of Las Vegas, 540 F.3d at 1079.

20 Moreover, the Court has not found and Plaintiff has cited no cases where an
21 initial CBA can be made orally. The cases cited by Plaintiffs concern oral agreements
22 modifying a written collective bargaining agreement. See Certified Corp. v. Hawaii
23 Teamsters and Allied Workers, Local 996, IBT, 597 F.2d 1269, 1271 (9th Cir. 1979)
24 (a “written collective bargaining agreement can be orally modified.”); In re Dittmar,
25 618 F.3d 1199 (10th Cir. 2010); Capitol-Husting Co. v. NLRB, 671 F.2d 237, 243 (7
26 Cir. 1982) (employer and union had an initial written contract which was later orally
27 modified after the initial contract expired). Plaintiff has not demonstrated that an initial
28

1 collective bargaining agreement can be oral.⁴

2 Alternatively, even if there was an oral collective bargaining agreement, the only
3 provisions Plaintiff alleges the parties orally agreed to were the four terms of the
4 proposed LRA which included the following: “a) the CNA’s service of a “Notice of
5 Intent to Organize” the Registered Nurses employed by Fallbrook; b) the CNA’s
6 subsequent organizing activity at Fallbrook; c) the filing of a petition for an election
7 with, and the conduct of a secret ballot election by, the National Labor Relations Board
8 (NLRB), and d) the negotiation of an initial collective bargaining agreement in the
9 event the CNA won an election and was certified by the NLRB, including the standard
10 of the conduct of bargaining between the Parties as specified on page 5, Section 4(a)(2)
11 of the Proposed LRA.” (Dkt. No. 11, SAC ¶ 25.) Section 4(a)(2) discusses conduct
12 for a productive and respectful bargaining process but does not address waiver of any
13 statutory rights. These provision that both parties allegedly specifically agreed to do
14 not address arbitration or waiver of statutory rights.

15 Accordingly, the allegations in the second amended complaint do not sufficiently
16 assert the existence of a valid waiver of Defendant’s right to bring charges before the
17 NLRB. Therefore, the breach of contract fails to state a claim as well as the relief it
18 seeks for damages, specific performance and declaratory relief. Accordingly, the Court
19 GRANTS Defendant’s motion to dismiss the SAC for failure to state a claim for relief.⁵

21 ⁴The Court notes that in the related case, 13cv1159-GPC(WVG), concerning a
22 petition for temporary injunction pursuant to 10(j) of the NLRA, the Court granted
23 Petitioner’s motion for temporary injunction and noted that the ALJ concluded that
since there was no collective bargaining agreement, there can be no arbitration clause.
(Case No. 13cv1159-GPC(WVG), Dkt. No. 17.)


24 ⁵The Court notes that in a very similar case involving the Hospital of Barstow,
25 the United States District Court for the Central District of California granted
26 Defendant’s motion to dismiss the SAC with prejudice. See Hosp. of Barstow v.
California Nurses Ass’n/National Nurses Organizing Committee, No. EDCV 13-1063
27 CAS (DTBx), 2013 WL 6095559 (C.D. Cal. Nov. 18, 2013). The Court held that not
28 only did the complaint fail to state a claim but even if plaintiff had alleged facts
establishing a waiver of defendant’s right to file ULP charges before the NLRB,
plaintiff failed to state a claim for breach of the alleged oral collective bargaining
agreement because the statutory right for relief before the NLRB cannot be foreclosed

Conclusion

Based on the above, the Court GRANTS Defendant's motion to dismiss. While Defendant requests that the Court grant the motion to dismiss without leave to amend, the Court shall grant Plaintiff one last chance to cure the deficiencies in the pleadings. Plaintiff shall be granted leave to file a third amended complaint within twenty one (21) days of the filed date of this Order. The hearing date set for February 21, 2013 shall be **vacated**.

IT IS SO ORDERED.

DATED: February 19, 2014


HON. GONZALO P. CURIEL
United States District Judge

by private contract. Id. at * 7 (citing Lodge 743, Int'l Ass'n of Machinists v. United Aircraft Corp., 337 F.2d 5, 8 (2d Cir. 1964)). The Court declines to discuss this issue as it was not briefed by the parties.